A-788 COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

UNITED STATES OF AMERICA,

-against-

MEMORANDUM AND ORDER

LANDRUM L. LATTIMORE,
Defendant.

82 Civ.189 (JMC)

X

CANNELLA, D.J.:

Defendant's motion for relief pursuant to 28 U.S.C. Section 2255 is denied.

In the instant motion, defendant raises the same three issues raised in his motion for a new trial, which the Court denied on December 24, 1980. See United States v. Lattimore, 75 Cr.431 (S.D.N.Y.Dec.24,1980). Because the Court sees no reason to alter its prior determination, this portion of the instant motion is denied for the reasons set forth

in the December 24,1980, decision.

One of three issues previously raised and decided concerned the conduct of the Court and the prosecutor during defendant's trial. In the instant motion, defendant has supplemented his prior assertions in this area with the contention that the Assistant United States Attorney was improperly permitted to argue to the jury that it would have to disbelieve Agent Magnunson's testimony to acquit the defendant. The Court finds, however, that the prosecutor's remarks were entirely proper as rebuttal summation. Moreover, defendant's generalized allegations of professional misconduct on the prosecutor's part are frivolous. Assistant United States Attorney Mann exhibited great patience and courtesy in the face

of defense counsel's persistent dilatory tactics, and her conduct consistently conformed with the high professional standards expected of prosecutors in this district.

Finally, defendant argues that his right to appeal has been denied. Defendant's direct appeal to the Second Circuit Court of Appeals was dismissed for failure to comply with that court's scheduling order, and his motion for reinstatement of the appeal was denied. Defendant contends that the Court of Appeals acted improperly and that this somehow constitutes a ground for relief under section 2255. The Court, however, will not second-guess the Court of Appeals. Therefore, this portion of the instant motion is also denied.

In accordance with the foregoing, defendant's motion for relief pursuant to 28 U.S.C. Section 2255 is denied in all respects.

SO ORDERED

/s/ John M. Cannella

United States District Judge

Dated: New York, N.Y.
January 25, 1982.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the seventeenth day of May One Thousand Nine Hundred and Eighty-Two.

Present:

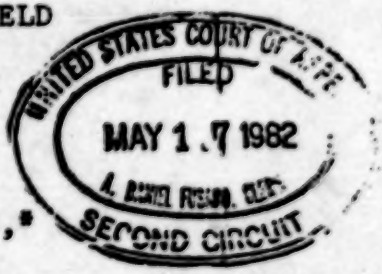
HONORABLE WALTER R. MANSFIELD

HONORABLE AMALYA L. KEARSE

Circuit Judges.

HONORABLE JOSE' A. CABRANES,*

District Judge.



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* Of the United States District Court for the District of Connecticut, sitting by designation.

82-2054

LANDRUM L. LATTIMORE,
Petitioner-Appellant

-against-

UNITED STATES OF AMERICA,
Respondent-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used unrelated cases before this or any other court.

Landrum L. Lattimore appeals from an order of the Southern District of New York entered on January 25,1982, by Judge John M.Cannella, denying his motion under 28 U.S.C. Section 2255 to vacate a prison sentence and fine imposed upon him on February 9,1981, following a jury trial resulting in a verdict finding him guilty of four counts of possession of heroin with intent to distribute it, 21 U.S.C.

sections 812, 841(a)(1), and 841(b)(1)(A). Lattimore's appeal from his conviction was dismissed when he failed to perfect it and his attempt to reinstate it was denied.

Ths district court properly denied without hearing Lattimore's claim that his post-arrest statements were involuntary and the product of unlawful pre-arraignment delay. After an exhaustive evidentiary pretrial hearing, the trial judge made factual findings to the contrary, which were amply supported by evidence. The judge further charges the jury that it should consider Lattimore's statements only if it found them to be voluntary. The record also reveals that Lattimore, after receiving proper Miranda warnings and advising the DEA agents that he wanted to cooperate, expressly waived in writing a

speedy arraignment following his request that he be permitted to remain in his home overnight, which was allowed.

Nor did the district court err in denying without hearing Lattimore's contention that the trial judge had improperly admitted in evidence tape recordings of his pre-arrest statements and allowed the jury to use transcripts in listening to the tapes. The tapes were properly authenticated by Agent Magnunson and the informant who participated with Lattimore in the taped conversations was made available as a witness. The trial judge's decision to allow the government to play relevant portions was proper, Fed.R.Evid. 1006; United States v. Weisman, 624F. 2d 1118, 1128-29 (2d Cir.), cert. denied, 449 U. S. 871(1980), especially since Lattimore

was offered the opportunity to play any other portions. We find no abuse of discretion in the court's conduct of the audibility hearing, United States v. Bryant, 480 F. 2d 785,790(2nd Cir.1973), since lack of clarity would go to the weight rather than the admissibility of the tapes, United States v.Provenzano, 615 F. 2d 37,40 n.4(2d Cir.),cert.denied, 446 U.S.953 (1980). Nor did the trial judge err in permitting the jury to use transcripts, which were not received in evidence, as aids in interpreting the tapes. There was no objection at trial to the accuracy of the transcripts. The tapes and transcripts were provided to the defendant well in advance of trial,United States v.Chiarizio,525 F. 2d 289(2d Cir. 1975); United States v.Slade,627 F. 2d

293 (D.C.Cir.),cert.denied,440 U.S.1034 (1980). Lattimore was further protected by the Court's instruction to the jury that the tapes were the sole evidence, not the transcripts.

Lattimore's claims of misconduct by the trial judge and the trial prosecutor must also be rejected. The record reveals that the trial judge's limited questioning of witnesses and comments were proper under the circumstances, that the prosecutor's closing argument and comments were well within permissible bounds, and that Lattimore received a fair trial.

The denial of Lattimore's Section 2255 petition is affirmed.

(sgd) Walter R.Mansfield
U.S.C.J.
(sgd) Amalya L.Kearse,
U.S.C.J.
(sgd) Jose' A.Cabranes,
U.S.C.J.